Filed 9/18/17 P. v. Robinson CA4/3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. STEVEN WALTER ROBINSON, JR., Defendant and Appellant.	G051906 (Super. Ct. No. 08ZF0029) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, James Rogan, Judge. Affirmed in part and reversed in part.

Robert E. Boyce, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Senior Assistant Attorney General, Barry Carlton, Sharon Rhodes, and Christopher P. Beesley, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

After a first trial, defendant was convicted of two counts of attempted premeditated murder (Pen. Code, §§ 664, subd. (a), 187, subd. (a), 189; counts 1 and 2)[1] and two counts of mayhem (§ 203; counts 3 and 4). Defendant appealed that judgment, contending instructional error infected the attempted murder convictions. We agreed and reversed.

On remand, the court ruled we had reversed only as to the attempted murder convictions and thus the mayhem convictions remained. The new trial would, therefore, concern only the attempted murder charges.

A second jury convicted defendant of the attempted murder charges. It also found he personally used a deadly weapon (§ 12022, subd. (b)(1)) and inflicted great bodily injury (§ 12022.7, subd. (a)) in the commission of the crimes. The court imposed a sentence of 7 years to life on count 1, and a consecutive 7 years to life on count 2. On each count, the court imposed consecutive three-year great-bodily-injury enhancements, and one-year enhancements for use of a deadly weapon. As to the mayhem counts from the prior trial, the court sentenced defendant to the midterm of 4 years for each count, but stayed the sentences pursuant to section 654. The total prison sentence was 22 years to life.

On appeal, defendant contends the court should have excluded certain aspects of the People's expert's testimony. He also contends the mayhem convictions must be reversed because they were nullified by the reversal of the prior judgment. Finally, he contends his trial counsel rendered ineffective assistance in failing to object to certain aspects of the prosecutor's closing argument. We agree that the mayhem convictions must be reversed. In all other respects, we affirm.

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1 All statutory references are to the Penal Code unless otherwise stated.

FACTS

The Stabbings

Early on the evening of February 24, 2008, defendant went to a movie theater in Fullerton. Dressed in black and wearing dark sunglasses, he purchased a ticket to see a horror film, *The Signal* (2007), a movie about people killing each other with knives when they received a signal. Defendant appeared upset and agitated, but, according to a theater manager, he did not appear to be under the influence of alcohol or drugs, nor did he smell of alcohol. He had a baggie of cookies and hallucinogenic mushrooms that he placed on the box office counter as he purchased his ticket. However, after getting the ticket, he left his baggie on the counter. The box office cashier took the baggie and laid it aside.

Defendant went to the concession counter where he purchased a large drink, but he left the drink on the counter as he left to walk to his theater. A security guard followed defendant and heard him mutter that he was early when he looked up at the movie start time in front of the theater auditorium. As defendant turned to walk away, the guard heard something sloshing in defendant's backpack and asked defendant what he had in his backpack. Defendant told him he had a bottle of alcohol and showed it to the guard. The guard told defendant that alcohol was not permitted in the theater and asked him to leave. Defendant responded, "Come on man. You're acting like that is a weapon of mass destruction." Defendant asked whether he could take the bottle home or to his car and then return, which the guard permitted on the condition that defendant check in with the security guard upon his return. Defendant and the guard carried on a coherent conversation, and defendant did not appear intoxicated to the guard. Defendant did not appear to have any problems with balance or coordination. Another manager who was present for this interaction described him as "slightly" intoxicated.

About 10 minutes later, defendant returned and stopped at the concession counter to ask the cashier whether anyone had turned in a lost baggie. He asked the guard the same question but the guard knew nothing about it. Afterwards, defendant exited again.

Shortly after the scheduled movie time, defendant returned to the theater lobby with his drink cup in hand. Seeing him with the drink cup, the security guard stopped defendant and asked to check his cup. The guard suspected that defendant could have poured alcohol into his drink cup. Defendant refused to let the guard look into his cup and asked for a refund for his ticket. Again, the guard did not smell alcohol on defendant and did not perceive defendant to be intoxicated.

Defendant received a refund. A manager told an employee that one reason he was authorizing a refund was because defendant was intoxicated.

Several minutes later, the box office cashier brought the baggie of cookies and mushrooms to the security guard. The guard took it to the manager and they suspected it was the bag defendant had been asking about. The manager, suspecting the baggie to contain drugs, called the police.

In the meantime, defendant had snuck into the building through a side entrance. He was discovered sitting in the theater by a security guard making his regular rounds. Defendant was seated in the upper level of the theater directly behind one of the victims. The guard informed his manager. By this point, the police were already on their way to respond to the call about the suspected baggie of drugs.

While the guard spoke with the manager, a police officer arrived. The manager explained to the officer what had happened and that defendant had entered without a ticket. The officer said he would call for backup.

Meanwhile, during the movie, defendant moved into the row in front of him where the first victim was sitting. Defendant suddenly attacked the victim, punching and stabbing him with a knife. The victim tried to grab defendant's hand to stop him, but

ended up cutting his hand in the process. The victim managed to kick defendant away and then got up to flee. As he fled, he tripped and saw defendant start to follow, but the victim escaped. He ran into the lobby screaming with his hand covered in blood. Seeing the victim, the police officer ran toward the theater. Backup had not yet arrived.

The first victim suffered five stab wounds to his arm, head, chest, and knee. The stab wound to his arm resulted in an irreparable tendon. He also suffered a pneumothorax (a punctured lung) and a broken rib.

Back in the theater, defendant moved toward his second victim. Although the second victim heard screaming during the attack, he was unaware of what had happened because there were screams throughout the movie. Defendant approached the second victim in a crouched position. Defendant had an angry look and pounced on the second victim, stabbing him in the arm and striking him on the head with what felt like a hammer. The second victim slipped out of his seat and crawled into the aisle where he sat against a wall. Defendant continued swiping at him with the knife as the victim was using his legs to kick at defendant to keep him away. When the victim heard the sounds of police chatter, both he and defendant looked and saw a police officer entering. Defendant took one last swipe at the second victim and left through the rear door.

The second victim suffered a deep stab wound in his arm resulting in severe nerve damage that left him without feeling in his hand and arm. At the time of trial in 2014, the second victim had still not fully recovered feeling. He also suffered blunt force trauma to his head.

The investigation that followed revealed disturbing aspects of defendant's social media profile. On his MySpace social media account, he included "murder, torture, and death" as his interests. The background image for his MySpace page depicted demons feasting in Hell. Defendant used the name PsychoKiller666 and the e-mail address necromantic@sbcglobal.net. In October 2007, he suggested to a bored MySpace user that she go kill someone. He wrote posts such as, "Kill, kill, kill," and,

less than two weeks before the stabbings, "Steven put the knife right into you." He also subscribed to a social media group focused on "world famous serial killers" and carried a picture of a decapitated corpse. However, he deleted such materials from his social media in the days following the theater stabbings because he believed "it could be taken the wrong way."

Detective Jose Arana interviewed employees and other people present at the theater the night of the stabbing. None of those interviewed told Arana they thought defendant was intoxicated, under the influence of alcohol or hallucinating.[2]

Defendant's Testimony

Defendant testified that on the day of the stabbings he began drinking whiskey and consumed hallucinogenic mushrooms around noon. He went to a friend's house around 12:30 p.m. and consumed more alcohol and mushrooms. A couple of hours later he went to the mall and was feeling the effects of the alcohol and drugs. When he arrived at the mall he had more mushrooms and poured some alcohol into a water bottle to take inside the mall. In the mall defendant went to an Apple Store but started feeling overwhelmed with all the voices, thinking he was hearing people's thoughts. Defendant went home and continued consuming alcohol and mushrooms. He watched the Oscars on television feeling as though he had a telepathic link to the people on the television. Eventually, defendant got bored and decided to go to a movie, *The Signal*.

Defendant bought a ticket but realized afterwards he was about an hour early. Defendant took a bottle of whiskey and some mushrooms into the theater; he left some mushrooms in his car. By that point he described himself as "pretty drunk," "tripping out," and hearing voices. After defendant was kicked out of the theater, he

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[2] This was a contested issue at trial. The theater manager and security guard both told police on the scene that defendant appeared intoxicated. And a cashier told Detective Arana that defendant seemed to be "on something."

went to his car, poured whiskey into his theater cup, and continued drinking and consuming mushrooms. He tried to reenter the theater but was stopped by security who demanded to check his drink cup. Defendant described his intoxication level as "pretty high" at that point. Defendant then noticed people leaving the theater from a side door and decided to use that entrance to reenter the movie theater as others were leaving. He went to the theater where *The Signal* was playing. The movie was "real violent and disturbing" and he was "tipping out quite a bit." Defendant then described a "psychedelic kaleidoscopic" mind control signal coming from the screen commanding everyone in the theater to attack one another, which led to defendant feeling extreme paranoia. Defendant testified he blacked out, and the next thing he remembered he was driving and did not know where he was. He got home and started crying, thinking something bad had happened, but he did not know what.

A few days later defendant threw the knife away. He read about the stabbings in the newspaper the next day and felt responsible. Defendant went to Las Vegas the next day to see his brother and nephew. He did not tell the police because he was scared, but he expected to be arrested. He was ultimately arrested in Las Vegas on March 6, 2008.

Expert Testimony

Dr. Nancy Kaser-Boyd, a clinical and forensic psychologist, assessed defendant. In her opinion he suffered from a schizoaffective disorder, a major mental disorder, having a combination of signs of schizophrenia, hallucinations, delusions and symptoms of mood disorder which could be mania, depression or recurrent depression. Defendant had a consistent history of depression since childhood. As a result of his condition, Dr. Kaser-Boyd opined he was "severely impaired."

Dr. Kaser-Boyd testified that, as with any psychotic disorder, a person might see something, misinterpret it and engage in impulsive behavior. Schizoaffective

disorder can cause someone to disassociate or impair their ability to recognize right from wrong.

Psychiatrist Dr. Charles Grob has extensive research experience studying the effects of hallucinogens, including psilocybin, the active alkaloid in hallucinogenic mushrooms. He testified that hallucinogenic mushrooms (or "magic" mushrooms in common parlance typically manifest hallucinogenic symptoms approximately 45 minutes after ingestion and the symptoms last 4 to 6 hours. The symptoms come on gradually and plateau over approximately two hours, then gradually diminish. To an outside observer, a person under the influence of hallucinogenic mushrooms may engage in unusual behavior, though some users are good at masking their symptoms and can engage in superficial conversation without appearing intoxicated.

Dr. Grob reviewed the materials produced in discovery from the Fullerton Police department in defendant's case including his MySpace account, school, medical and psychiatric records, prior witness testimony and reports by Dr. Nancy Kaser-Boyd. Dr. Grob agreed with Dr. Kaser-Boyd's assessment that defendant suffered from schizoaffective disorder. Dr. Grob would alternatively diagnose defendant as suffering from recurrent major depression with psychotic features and possibly autism spectrum disorder.

A delusion is a fixed false belief in conflict with the consensus reality interpretation; a hallucination is a perceptual disturbance. Both can occur when someone is under the influence of psilocybin. Alcohol increases risk and confusion when consumed with hallucinogens and intensifies the mushroom experience.

Dr. Grob was given a hypothetical mirroring the evidence in this case. He opined throughout the hypothetical that the subject's actions are consistent with the drugs and alcohol defendant claims to have ingested combined with defendant's psychological condition. He further opined that the subject would not necessarily be cognizant of the fact that the hallucinations he is experiencing are not real. He described the dose that

defendant claims to have taken — 12 mushrooms over the course of the day — as "very, very large." Notwithstanding this high dose, Dr. Grob opined it is possible the subject could have hidden any signs of intoxication, carried on basic conversations as normal, and performed basic functions including driving. At the point in the hypothetical where the subject stabs the first victim, Dr. Grob opined that the subject's ability to formulate a specific intent to kill would be impaired due to the confusion, fear, anxiety he was feeling, combined with the hallucinogenic symptoms brought on by the mushrooms.

The People called Fullerton Police Sergeant Anthony Diaz, a certified drug recognition expert. Diaz's training included approximately 600 hours of formal classroom training related to drugs and their effect on people. In 2006 he became an instructor in the drug recognition expert program. He has performed thousands of investigations of individuals suspected to be under the influence of a controlled substance. In particular, he has encountered over 100 individuals under the influence of psilocybin mushrooms.

Diaz testified that a person under the influence of psilocybin has hallucinations, but knows they are not real. He further testified that he has never encountered someone under the influence of psilocybin that acted out violently. Rather, in his experience, individuals having a "bad trip" tend to flee and cower in fear.

He went on to cast doubt on defendant's version of the events. Based on the amount of drugs and alcohol defendant allegedly ingested, Diaz testified defendant would not have been able to negotiate the purchase of a movie ticket without obvious signs of intoxication. Nor, having been caught with alcohol inside the theater, would he have been able to negotiate with the security guard without obvious signs of intoxication. He would have had difficulty talking, balancing, and finding his way to his car. He would have struggled to form the train of thought required to reason that, having been kicked out of a theater, he could pour his alcohol in a theater cup and get back in by sneaking through the side entrance.

Diaz was then given the following hypothetical: "This same John Doe who is supposedly profoundly intoxicated on alcohol and psilocybin and he has reacted to something in a movie and he is wearing dark sunglasses inside a dark theater and he is able to get up out of his row, find the row where the closest two people in the theater are to him, enter the row, attack one person with a knife and not wildly attack like anywhere but attack upper vital body areas like putting the knife on the person's chest, stabbing them in the head, stabbing them in the arm; and then when that person runs away, he's able to — he is at the top level of the theater, there are three levels — he is able to negotiate the rows and then crouch up on the only remaining human figure in the theater, starts stabbing that person . . . , hitting him with a hammer-type object to the head. And then suddenly when there is police chatter coming into the theater to turn his head immediately in the direction of the police chatter, take one final swipe, and make it out the exit to the theater. [¶] [D]oes that sound realistic to you?"

Diaz gave the following answer: "I have trouble walking down those dark aisle ways in movie theaters carrying popcorn and a soda pop. So somebody who is profoundly intoxicated, under the influence of psilocybin, it would be nearly impossible with shades on to maneuver and move about to identify and find all targets because you understand your body is getting all these visual and auditory sensations. [¶] So it's very difficult for people under the influence of psilocybin alone to focus on certain objects, on just one thing. So being able to do exactly what you described is in my experience absurd." Diaz went on to testify that, were defendant as high and intoxicated as he claimed, he would not have been able to drive away after the stabbings.

DISCUSSION

There Was No Abuse of Discretion in Admitting Diaz's Testimony

We begin with defendant's contention that the court erred in permitting Diaz to testify about the psychological effects psilocybin has on a user. An expert is permitted to offer an opinion on "a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact . . . ." (Evid. Code, § 801, subd. (a).) "A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates. Against the objection of a party, such special knowledge, skill, experience, training, or education must be shown before the witness may testify as an expert." (Evid. Code, § 720, subd. (a).) We review the trial court's decision to permit the testimony for abuse of discretion. (*People v. Mendoza* (2017) 24 Cal.4th 130, 177, superseded by statute on other grounds in *People v. Brooks* (2017) 3 Cal.5th 1, 63, fn. 8.)

Defendant objects to four aspects of Diaz's testimony: (1) that a user of psilocybin will not build up tolerance to that drug by taking other drugs; (2) that someone under the influence of psilocybin seeks out and is comfortable in a place with loud noises; (3) that someone having a hallucinogenic experience knows he is experiencing an illusion; and (4) someone under the influence of psilocybin will not act out violently.

To provide context to the first aspect, Dr. Grob had testified that, notwithstanding defendant's lack of experience taking hallucinogenic mushrooms, he may have been able to take a large dose yet seem relatively unaffected because of cross-tolerance; i.e., having experience with other mind-altering drugs may have conferred some tolerance to the effects of psilocybin. Dr. Grob testified there was some evidence of this in animals, but no human studies had demonstrated cross-tolerance. Sergeant Diaz

merely testified that he had not seen the materials Dr. Grob referred to, but that Diaz had not witnessed any cross-tolerance evidence in his own career.[3]

This testimony was clearly proper. Diaz has extensive training and experience working with drug users and could certainly testify to having not observed the effects of cross-tolerance.

The remaining aspects of Diaz's testimony related to general effects of psilocybin on users. Defendant cites no authority suggesting Diaz lacked the expertise to testify to the general effects of psilocybin. We upheld the validity of similar testimony in *People v. Benner* (2010) 185 Cal.App.4th 791. The issue there was whether methamphetamine was a "drug" for purposes of Vehicle Code section 23152, subdivision (a). Vehicle Code section 312 defines a drug as any substance "which could so affect the nervous system, brain, or muscles of a person as to impair, to an appreciable degree, his ability to drive a vehicle in the manner that an ordinarily prudent and cautious man, in full possession of his faculties, using reasonable care, would drive a similar vehicle under like conditions." Holding substantial evidence supported the finding that methamphetamine is such a drug, the court relied on the testimony of a drug recognition expert: "[D]rug recognition expert . . . testified methamphetamine tends to make people jittery, anxious and emotionally erratic. He said users are prone to mood swings and are generally unable to perform tasks they are given. While decreased agility and concentration does not result in all cases, the drug tends to make it harder for people to perform 'divided attention tasks,' i.e., those tasks that require a person to do more than one thing at a time." (*Benner*, at p. 795.)

Based on our review of the record, the court was within its discretion in determining Diaz's extensive training and experience qualified him to speak to the usual

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[3] He also speculated that cross-tolerance is unlikely as it would cause potential problems during surgeries, but that testimony was objected to and stricken, and the jury was admonished.

effects of psilocybin on a user. Importantly, Diaz made no attempt to testify as to how defendant's psychological diagnosis may have altered the usual effects of psilocybin. His testimony was general in nature and based on his experience and training.

Defendant raises colorable arguments criticizing Diaz's testimony, but in our view those were arguments for the jury. He argues Diaz's experience of encountering approximately 100 people under the influence of psilocybin provides too small a sample size to generate scientific conclusions, and that even those observations were not in a controlled, clinical setting. While those are fair points, defendant ignores Diaz's extensive classroom experience, as well as his testimony that his experiences corroborated what he learned in the classroom. Ultimately, it was for the jury to determine what weight to give Diaz's testimony.

Defendant also argues that while "Diaz could testify regarding the symptoms someone under the influence of psilocybin would exhibit," he could not "provide the sufficient relevant data to opine on the level of intoxication of a person Diaz had not even examined," i.e., defendant. But Diaz never opined about defendant's state. He offered an opinion based on his training and experience about a hypothetical regarding a John Doe under the influence of psilocybin and alcohol. To the extent the hypothetical omitted the sort of psychiatric disorders defendant claims to suffer, it was for defense counsel to argue the point to the jury (which he did). There was no error.

The Mayhem Convictions Must Be Reversed

Defendant contends the mayhem convictions must be reversed because our prior reversal in this case amounted to a remand for a new trial. We agree.

"If a judgment against the defendant is reversed, such reversal shall be deemed an order for a new trial, unless the appellate court shall otherwise direct." (§ 1262.) "The granting of a new trial places the parties in the same position as if no trial had been had. All the testimony must be produced anew, and the former verdict or

finding cannot be used or referred to, either in evidence or in argument, or be pleaded in bar of any conviction which might have been had under the accusatory pleading." (§ 1180.)

Our disposition in the prior opinion was as follows: "The judgment is reversed. The matter is remanded to the court for a new trial before a properly instructed jury." (*People v. Robinson* (Jan. 13, 2011, G043027 [nonpub. opn.].) We recognize that our analysis in the prior opinion concerned only the attempted murder charges. We held defendant was entitled to an instruction regarding whether his mental illness impaired his ability to premeditate and form the intent to kill. (See CALCRIM 3428.) However, our disposition did not limit the scope of the retrial. Accordingly, the mayhem convictions are based on a trial that, for all legal purposes, never occurred.

The People argue the mayhem conviction may stand because a criminal judgment is the sentence, and thus, having reversed the judgment, we reversed only the sentence, not the actual conviction. (*See People v. Wilcox* (2013) 217 Cal.App.4th 618, 625 ["'A "sentence" is the judgment in a criminal action'"].) While we appreciate the creative thinking, the People's argument is flatly inconsistent with the Penal Code provisions cited above. A reversal of a judgment does not merely reverse the sentence — it puts the parties in the same position as if the trial had never occurred. Plainly, there can be no conviction without a trial, and thus a reversal nullifies not only the sentence but the conviction as well.

The People also argue that only a reversal *without instructions* constitutes an order for a new trial, and here we provided instructions for "a new trial *before a properly instructed jury*." (*People v. Robinson, supra*, G043027, italics added; s*ee People v. Barragan* (2004) 32 Cal.4th 236, 247 ["'A reversal of a judgment without directions is an order for a new trial'"].) Our qualification of "before a properly

instructed jury," however, did not limit the scope of a new trial. That qualification simply reflected our analysis. It did nothing to alter the default result of a reversal.[4]

Defense Counsel Was Effective

Defendant's final contention is that his trial counsel rendered ineffective assistance in failing to object to certain arguments the prosecutor made during closing. An ineffective assistance of counsel claim has two prongs. (*Strickland v. Washington* (1984) 466 U.S. 668, 687.) First, a convicted defendant "must show that counsel's representation fell below an objective standard of reasonableness." (*Id*. at 688.) "Second, the defendant must show that the deficient performance prejudiced the defense [and] deprive[d] the defendant of a fair trial." (*Id*. at 687.) "[T]he standard for judging counsel's representation is a most deferential one." (*Harrington v. Richter* (2011) 562 U.S. 86, 105.)

The comments at issue were intended to make the point that defendant had not pleaded insanity, and thus he could be convicted of attempted murder even if he thought he was right in stabbing his victims. "[Y]ou can have a false belief, that doesn't mean that you don't intend to do what you do." "I'll give you an example. A woman suffers from paranoid delusions. She believes . . . incorrectly . . . that . . . her neighbor

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[4] In light of our conclusion that the mayhem convictions must be reversed, we need not address two of defendant's arguments. Defendant first argues the court erred in ruling in limine that the jury was not to be made aware of the mayhem convictions. Defendant argues this improperly left the jury with an all or nothing choice: "either find [defendant] had specific intent or acquit [defendant] after committing a very serious attack on two people with a knife." Since the mayhem convictions were nullities, however, it was clearly proper that the jury not be told of them. In a similar vein, defendant also contends the prosecutor erred in putting up a slide during closing argument that read "Don't give the defendant a free pass" in connection with the lesser included offense of voluntary manslaughter. Defendant argues the prosecutor "took advantage of the court's ruling preventing the jury from learning of the mayhem convictions . . . ." Once again, however, since the mayhem convictions were nullities, the prosecutor gained no advantage in keeping that information from the jury.

has stolen her vacuum cleaner. So she breaks into the neighbor's house. She knows it's a crime, she knows what's going to happen, but she thinks it's her right because they took her vacuum cleaner. She breaks into their home and takes their vacuum cleaner which she falsely believes is her own. The fact that her belief is false and it's because of that belief that she then makes the decision to do it, that doesn't negate the intent." "Again this might be a different issue if we're dealing with a question of was she legally sane at the time she committed this act? Could she appreciate the difference between right and wrong? That's not an issue in this case. There is no insanity plea." The prosecutor then gave another example where John passes by a room, sees Tom handing a pen to Bill, but erroneously believes the pen is a gun being pointed at Bill. John pulls out a knife and stabs Tom to save Bill. "The fact that he had a false belief, that his reality was off, that he thought there was a gun involved, that doesn't negate his intent. So anyway the false belief does not negate the intent to kill. That's the point of this whole exercise."

Defense counsel did not object to this line of argument. Instead, he provided an astute response in his closing argument: John would be guilty of, at most, voluntary manslaughter based on imperfect defense of others, which is one of the outcomes defendant was hoping for in this case.

On appeal, defendant contends, "These examples led the jury to understand they could not consider [defendant's] mental impairment to negate the specific intent to kill, and as long as his delusion did not interfere with his general intent to perform the act of stabbing, he was guilty. The prosecutor's argument misled the jury, and removed the defense of mental impairment from the jury's consideration."

We do not interpret the prosecutor's comments that way, and we find no evidence in the record the jury did so either. The prosecutor's examples highlighted a legitimate point: whether defendant believed his actions were right or wrong was irrelevant in this case because defendant did not plead insanity. (See § 25, subd. (b).) Rather than object to those examples, which probably would have gotten defense counsel

nowhere, defense counsel ably responded to them in his own closing argument. The "failure to object is a matter of trial tactics as to which we will not exercise judicial hindsight." (*People v. Kelly* (1992) 1 Cal.4th 495, 520.) "A reviewing court will not second-guess trial counsel's reasonable tactical decisions." (*Ibid*.) Moreover, defendant concedes the court "gave technically correct instructions," and thus there is no reason to believe the jury was misled. Since we find no objection was necessary, defendant's ineffective assistance claim fails.

DISPOSITION

The judgment is reversed as to the mayhem counts (counts 3 and 4). In all other respects, the judgment is affirmed.

IKOLA, J.

WE CONCUR:

MOORE, ACTING P. J.

ARONSON, J.